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In The
Supreme Court of the United States

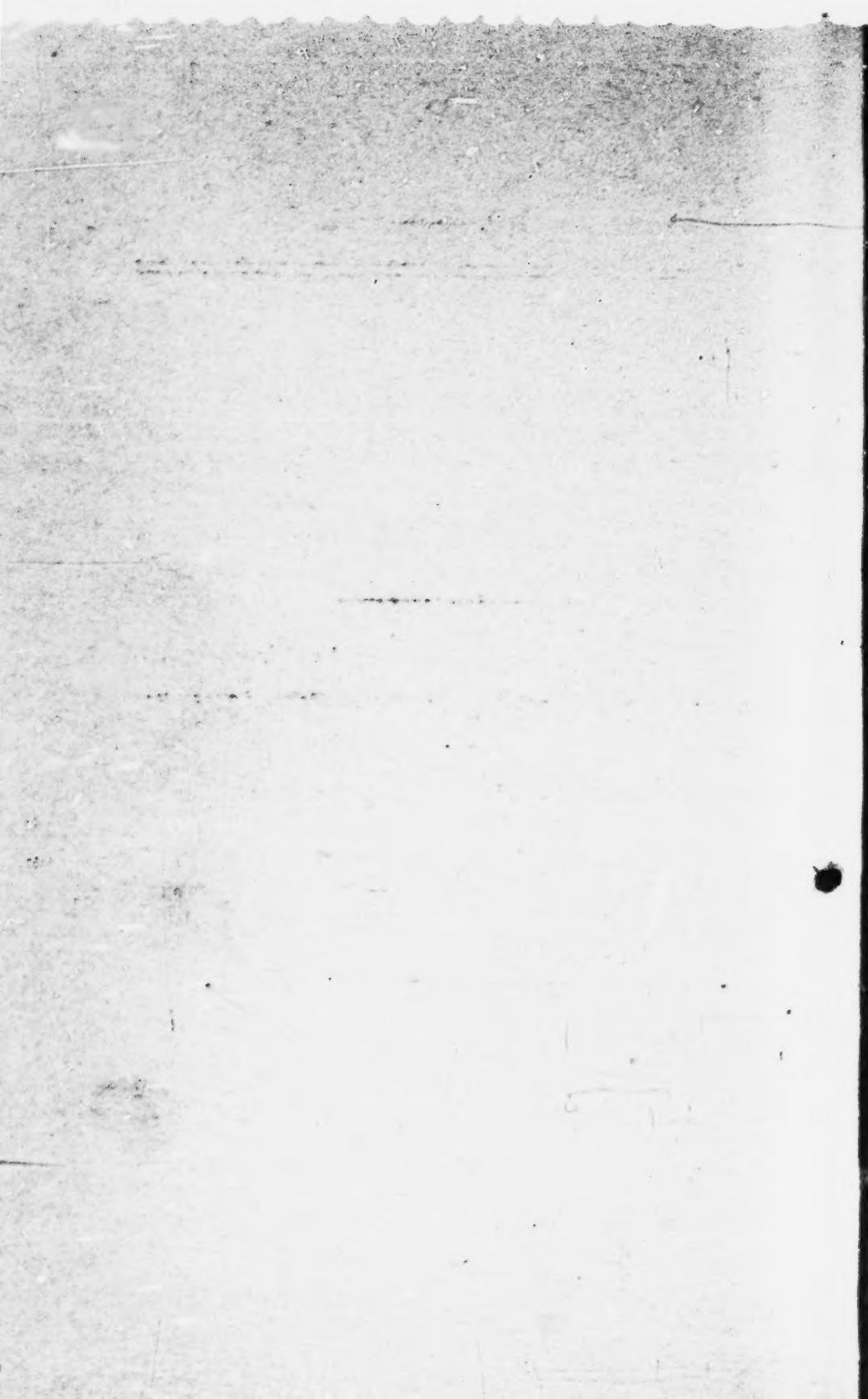
OCTOBER TERM, 1941

JOHN C. CURRY, individually and as Commissioner of Revenue of the State of Alabama, Petitioner

vs.

UNITED STATES OF AMERICA, DUNN CONSTRUCTION COMPANY, INC., and JOHN S. HODGSON AND COMPANY, partners doing business as Dunn Construction Company, Inc., and John S. Hodgson and Company.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA



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UNITED STATES OF AMERICA, DUNN CONSTRUCTION COMPANY, INC., and JOHN S. HODGSON AND COMPANY, partners doing business as Dunn Construction Company, Inc., and John S. Hodgson and Company.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

John C. Curry, individually and as Commissioner of Revenue of the State of Alabama, prays that a writ of certiorari issue to review the final decree of the Supreme Court of Alabama rendered in the above case on July 29, 1941 (R. folio 134, 135), reversing and rendering the decree of the Circuit Court of Montgomery County, Alabama, in Equity (R. folio 123, 124).

OPINIONS BELOW

The opinion of the Circuit Court of Montgomery County, Alabama, in Equity (R. folio 123, 124), is not reported.

The opinion of the Supreme Court of Alabama (R. folio 136-138) has not been officially reported, but such opinion and the dissenting opinion therein may be found in 3 So. (2d) 582.

JURISDICTIONAL STATEMENT

This is a companion case to that of *State of Alabama, Petitioner vs. King and Boozer, and United States of America*, Supreme Court of the United States, October Term, 1941, No., both cases having been argued and decided as companion cases in the Court below.

The final decree of the Supreme Court of Alabama sought to be reviewed was entered on July 29, 1941, (R. folio 134, 135). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decree below sustained a right or immunity claimed by the respondents under the Constitution of the United States.

The issue in this case is whether the respondents, Dunn Construction Company, Inc., and John S. Hodgson and Company are taxable under the provisions of the Alabama Use Tax Act (General Acts of Alabama, 1939, p. 96) with respect to the storage,

use or other consumption of tangible personal property by such respondents, as contractors under and pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States. The sustaining of the claim for such immunity by the Court below plainly presents a Federal question reviewable under Section 237 (b) of the Judicial Code. *Federal Land Bank v. Priddy*, 295 U. S. 229; *Pittman v. Home Owners' Corporation*, 308 U. S. 21; *The Federal Land Bank of St. Paul v. Bismarck Lumber Company*, No. 1035, October Term 1940.

The claim by the respondents, Dunn Construction Company, Inc., and John S. Hodgson and Company, of immunity from the application of the Alabama Use Tax Act under the Constitution of the United States was specially set up in the protest of payment of the tax (R. folio 49, 50); this claim was further set up by all the respondents in their bill for a declaratory judgment in the Circuit Court of Montgomery County, Alabama, in Equity (R. folio 5-7); in the amended bill (R. folio 43-45); in the assignments of error by all the respondents, appellants in the Court below (R. folio 129, 130); and was briefed and argued in the Court below.

The grounds upon which it is contended that the questions are substantial are set forth in the Reasons for Granting the Writ, *infra*.

QUESTIONS PRESENTED

1. Whether the assessment of a tax under the Alabama Use Tax Act with respect to the storage,

use, or other consumption of tangible personal property by contractors storing, using, or otherwise consuming the same under and pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States is repugnant to the Constitution of the United States.

2. Whether the United States, by the terms of such contract, validly consented to the payment of such tax by the contractors and to the reimbursement thereof as part of the cost of construction.

STATUTES INVOLVED

The pertinent provisions of the Alabama Use Tax Act (General Acts of Alabama, Regular Session and Special Session, 1939, p. 96), and of the Acts of Congress (Military Appropriation Act, 1941, Public No. 611, 76th Congress, 3d Sess., c. 343, the Act of July 2, 1940 Public No. 703, 76th Cong., 3d Sess., c. 508, and the Act of October 9, 1940, Pub. No. 819, 76th Cong., 3d Sess., c. 787), are printed in the Appendix, *infra*.

STATEMENT

This petition is filed to review a final decree of the Supreme Court of Alabama rendered on July 29, 1941, which held invalid an assessment of use taxes made by the State of Alabama under the provisions of the Alabama Use Tax Act (General Acts of Alabama, Regular Session, 1939, page 96) against the respondents, Dunn Construction Company, Inc., and John S. Hodgson and Company, contractors, with respect to the storage, use, or other consumption of tangible personal property

purchased and stored, used, or consumed by said contractors under and pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States for the construction of a complete tent camp at the military reservation known as Fort McClellan in the State of Alabama.

The Supreme Court of Alabama, upon the authority of the decision in the companion case in that Court, *King and Boozer vs. State of Alabama*, 3 So. (2d) 572, held that the storage, use, or other consumption was immune from State taxation under the Constitution of the United States. In the majority opinion of the Court below it was further held that the contractors were instrumentalities of the United States; and that the United States had not consented to the tax or to the payment thereof by the contractors as a part of the cost of the construction (R. folio 136). A dissenting opinion was rendered by one of the Justices (R. folio 137, 138).

The "Cost-Plus-a-Fixed-Fee Construction Contract" was executed on September 9, 1940, under the authority of Acts of Congress, namely, the Military Appropriation Act, 1941, Public, No. 611, 76th Cong., 3d Sess., c. 343, and the Act of July 2, 1940, Public, No. 703, 76th Cong., 3d Sess., c. 508. (Appendix, pp)

The purchases of all the property and the storage, use, or consumption thereof involved in said assessment took place in substantially the same manner as particularly stipulated with respect to certain roofing material purchased by the contractors from the Certainteed Products Company of Atlanta, Georgia

(R. folio 65, 66). The contractors submitted the purchase order to Certainteed Products Corporation of Atlanta, Georgia, and the materials therein ordered were shipped by such vendor by freight from Atlanta, Georgia, to "United States Construction Quartermaster, at Fort McClellan, Alabama, Account of Dunn Construction Company, Inc., and John S. Hodgson & Company." Such materials, upon arrival at destination, were unloaded, and after being inspected by representatives of the contractors and the United States, were placed in a general warehouse located within said Fort McClellan, which warehouse belonged to the United States, and was used for the storage of materials purchased in connection with the performance of said contract. Such materials were thereafter withdrawn and used by contractors as and when needed by them in the performance of said construction contract (R. folio 66, 67).

After delivery of the goods to the respondent contractors and the payment therefor by the contractors with their own funds (R. folio 67), they received reimbursement therefor from the United States (R. folio 68). The invoice rendered the contractors did not include the Alabama sales or use tax (R. folio 74); and no such tax was paid to the State of Alabama by either the vendor or the contractors prior to the making of said assessment. (R. folio 68).

The essence of said contract is that the contractors were obligated to "furnish the labor, materials, tools, machinery, equipment, facilities, supplies not furnished by the Government, and services, and do all

things necessary for the completion of the following work: Construction of a complete tent camp * * * * * at Fort McClellan in the State of Alabama in "accordance with the drawings and specifications or instructions contained in appendix 'A' hereto attached and made a part hereof, or to be furnished hereafter by the Contracting Officer and subject in every detail to his supervision, direction, and instructions" (R. folio 15); and were to receive from the United States in consideration for their undertaking under the contract the following:

"(a) Reimbursement for expenditures as provided in Article II.

"(b) Rental for Contractor's equipment as provided in Article II.

"(c) A fixed fee in the amount of One Hundred Twenty-eight Thousand Eight Hundred Sixty-five Dollars (\$128,865.00) which shall constitute complete compensation for the Contractor's services, including profit and all general overhead expenses." (R. folio 16)

The total estimated cost of the construction, exclusive of the contractors' fee, was "THREE MILLION TWO HUNDRED FOUR THOUSAND AND FIVE HUNDRED EIGHTY-EIGHTY DOLLARS (\$3,204,588.00), as stated in Article I (R. folio 15).

Article II of the contract, among other things, provided as follows:

"Cost of the work.

"REIMBURSEMENT FOR CONTRACTOR'S EXPENDITURES.

"1 The Contractor shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work as may be approved or ratified by the Contracting Officer and as are included in the following items:

"(a) All labor, material, tools, machinery, equipment, supplies, services, power, and fuel necessary for either temporary or permanent use for the benefit of the work. All articles of machinery or equipment valued at \$300 or less shall be classed as tools and shall be charged directly to the work. Title thereto shall thereupon pass to the Government." (R. folio 17)

"(m) Payments from his own funds made by the Contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor." (R. folio 19)

Other expenditures itemized in Article II are not involved in the case.

Paragraph 3 of Article I of the contract contained the following provision with respect to title to materials purchased by the contractors, viz:

"3 The title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Article II, shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract." (R. folio 16)

Article V of the contract under the head of "Special Requirements" contained, among other provisions, the following:

"1. The contractor hereby agrees that he will:"

"(b) Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United State of America, of the State, Territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority."

"(c) Unless this provision is waived in writing by the contracting officer, reduce to writing

every contract in excess of two thousand dollars (\$2,000) made by him for the purpose of the work hereunder for services, materials, supplies, machinery, or equipment, for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchases without the prior approval of the Contracting Officer." (R. folio 24)

The purchase orders, as shown by copy of a typical purchase order (R. folio 71), after approval by the Constructing Quartermaster, were given by the contractors to the vendors. Said purchase orders contained the following shipping instructions:

"Ship To: UNITED STATES CONSTRUCTING QUARTERMASTER At Fort McClellan, Ala.

For account of Dunn Construction Co., Inc., and John S. Hodgson & Co." (R. folio 71)

The following, among other statements, were endorsed on the purchase orders:

"This order is placed for the benefit of, and is assignable to, the United States Government.

"This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder." (R. folio 72)

The following, among other instructions, were endorsed on each purchase order :

"2. Immediately upon shipment mail to Dunn Construction Co., Inc., and John S. Hodgson & Co., at Fort McClellan, Ala.:

"A. Original and two (2) copies of Bill of Lading, or shipping papers.

"Bills of Lading, etc., must read

United States Construction Quartermaster
at Fort McClellan, Ala.

Account of Dunn Construction Co., Inc., and John S. Hodgson & Company and must also bear Purchase Order Number.

"B. Six (6) copies of invoice, properly filled and certified as follows:

"I certify that the above bill is correct and just; that payment therefor has not been received; and that except as noted below or otherwise indicated herein all unmanufactured articles, materials, or supplies furnished

under this invoice have been mined or produced in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed." (R. folio 72)

The record showed that in placing orders for materials, shipping and making delivery thereof, and in obtaining reimbursement therefor, the contractors were required to comply with various detailed rules, regulations or instructions of the United States or the Contracting Officer or his agent, the Constructing Quartermaster, but for the purpose of this petition, it is not deemed necessary to set forth in more detail the facts relating to such circumstances and incidents. (R. folio 80-121)

Under the provisions of Section IX of the Alabama Use Tax Act, the assessment was made on May 8, 1941, against the respondents, Dunn Construction Company, Inc., and John S. Hodgson and Company, covering the period beginning January 1, 1941, and ending March 31, 1941, in the amount of Forty-six and 26/100 Dollars (\$46.26), being an amount equal to two per cent (2%) of the sales price of such property, together with the sum of Four and 63/100 Dollars (\$4.63) as penalty, and the sum of 23/100 Dollars (\$.23) interest, amounting in the aggregate to the sum of Fifty-one and 12/100 Dollars (\$51.12) (R. folio 47, 48).

The respondent contractors on the same day paid to the State Department of Revenue, under protest, the amount of said assessment. (R. folio 48-51).

Under the provisions of Section XXIV of such Act, the respondent contractors, together with the United States of America, filed a petition in the Circuit Court of Montgomery County, Alabama, in Equity, against John C. Curry, as Commissioner of Revenue, praying for a declaratory judgment to determine the liability of the respondent contractors for the amount so paid or their rights to a refund thereof (R. folio 2-40; amended petition R. folio 40-46).

The trial Court upheld the validity of the assessment (R. folio 123, 124), from which an appeal was taken by the respondents to the Supreme Court of Alabama (R. folio 124, 125).

In the trial of the cause in the Circuit Court and on appeal in the Supreme Court, the respondents contended that the "storage, use, or other consumption of the tangible personal property which is the subject of the tax in controversy were the storage, use, or other consumption by the United States or by an agency or instrumentality of the United States on behalf of the United States, and are constitutionally immune from taxation by the State of Alabama," and that the United States had not consented to the imposition of the tax in controversy.

The petitioner contended that the tax as imposed upon the respondent contractors was valid; that the

storage, use, or other consumption which was the basis of the tax was a storage, use, or other consumption by the respondent contractors, a private corporation and partnership composed of individuals, both engaged in business for private profit, who were not acting as instrumentalities of the United States; that the imposition of the tax upon the contractors did not constitute an undue burden upon the United States; that the United States waived any immunity with respect to such tax in that: by the terms of the contract the United States consented to the payment by said contractors of such taxes, and provided for the reimbursement thereof, as a part of the cost of such construction.

On July 29, 1941, the Court below rendered its final decision, one Justice dissenting; and on the authority of the decision in the companion case in such Court of *King and Boozer vs. State of Alabama*, 3 So. (2d) 572, reversed the decree of the trial Court and rendered a final decree in favor of the respondents and against the petitioner (R. folio 136-138).

This case was presented to the Supreme Court of Alabama as a companion case to *King and Boozer vs. State of Alabama*, 3 So. (2d) 572, decided on the same date, involving the validity of an assessment of sales taxes made under the Alabama Sales Tax Act (General Acts of Alabama, Regular Session, 1939, p. 16) with respect to materials sold to the respondent contractors, and in which companion case a like petition for writ of certiorari is being filed with this Court.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Alabama based its decision on the authority of the companion case in that Court of *King and Boozer v. State of Alabama*, 3 So. (2d) 572, on the ground that the questions presented for decision in this case were substantially the same as those discussed and decided in the *King and Boozer* case (R. folio 136). Therefore, the opinion of the Court in the *King and Boozer* case must be examined to determine the reasons for the Court's decision in the case at bar.

The writ should be granted for the following separate and several reasons:

1. The decision of the Court below that the use, storage, or other consumption of tangible personal property by contractors storing, using, or otherwise consuming the same pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States is immune under the Constitution of the United States from nondiscriminatory use taxes imposed by the State, for the reason that the State is prohibited by the Constitution of the United States from imposing "any tax upon the transactions by which the United States secures the things desired for its governmental purposes," was based upon the cases of *Panhandle Oil Co. v. Mississippi, ex rel. Knox*, 277 U. S. 218, and *Graves v. Texas Co.*, 298 U. S. 393. These cases have been distinguished and expressly

limited to a tax upon direct sales to the United States or an instrumentality thereof. *Liggett & Myers Tobacco Co. v. United States*, 299 U. S. 383; *Wheeler Lumber Bridge and Supply Co. v. United States*, 281 U. S. 572; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Silas Mason Co. v. Tax Commission*, 302 U. S. 186; *Trinity Farms Construction Co. v. Grosjean*, 291 U. S. 466. The Court below clearly erred in applying the holding of the *Panhandle* and *Graves* cases to the storage, use, or consumption of materials purchased by a contractor.

2. The power of the State to impose a nondiscriminatory use tax upon a contractor storing, using, or otherwise consuming materials purchased by him pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States is not dependent upon consent of Congress.* However, such form of contract, and particularly the tax provision therein (Article II (m)), was considered by Congress on June 4, 1940 (Congressional Record, 76th Congress, 3d Session, Volume 86, Part 7, pp. 7518, 7527-7539), when it rejected proposals to change such provision or the status of the contractors in purchasing materials under such contract; and, thereafter, in the Act of July 2, 1940 (Public No. 703), under which the construction of Fort McClellan, Alabama, was authorized, Congress expressly authorized the Secretary of War to use "the cost-plus-a-fixed-fee form of contract" (Section 1, Public, No. 703, Appendix,

*Act of October 9, 1940, Pub. No. 819, 76th Cong., 3d Sess., c. 787, (Appendix, *infra*), effective after December 31, 1940, permitted imposition of State sales and use taxes in any Federal area.

infra). Notwithstanding such express approval of the form of contract and the delegation of authority to the Secretary of War to execute the same, as we read the decision, the Court held there was no congressional consent to the imposition of the tax, or to the payment thereof as a part of the "Cost of the Work" (Article II (m).); and that if the provision in Article II (m) of the contract was intended as a waiver of any tax immunity, the officer executing the contract (the Secretary of War) lacked the power or authority to do so; and, as interpreted by the Court, the provision was rendered meaningless. This was clearly erroneous.

3. Although the Court failed to designate the status of the contractors, it, in effect, construed them to be instrumentalities of the United States, entitled to constitutional immunity from State taxation. As the contractors were operating for private profit, the decision on this point was clearly erroneous. *Baltimore Ship Bldg. & Dry Dock v. Baltimore*, 195 U. S. 375; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Standard Oil Company v. Lee*, 199 So. 325; *Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319; *Brooklyn Ash Removal Co., Inc. v. United States*, 80 Ct. Cls. 770, cert. den., 295 U. S. 752; *Helvering v. Chilborne-Annapolis Ferry Co.*, 93 Fed. (2d) 875.

4. The decision of the Court below is directly in conflict with the decision of the Supreme Court of Florida, the highest Court of such State, in the case of *Standard Oil Company v. Lee*, 199 So. 325, where

the same form of contract and the same Federal questions were involved. Such conflict has been held to constitute a ground for granting a writ of certiorari. *Pagel v. MacLean*, 283 U. S. 266; *Singleton v. Cheek*, 284 U. S. 493; *Spicer v. Smith*, 288 U. S. 430; *Trotter v. State of Tennessee*, 290 U. S. 354; *Pagel v. Pagel*, 291 U. S. 473; *Connell v. Walker*, 291 U. S. 1; *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U. S. 57.

5. The decision of the Court below involves the construction of a form of contract expressly authorized by Congress for general use in connection with the National Defense Program involving the expenditure of billions of dollars. A decision by this Court is necessary to settle conflicting interpretations by the Courts and administrative authorities of such form of contract, to determine the Constitutional questions involved as affecting the taxing power of the States, the immunity of the Federal Government, and the doctrine of intergovernmental tax immunity.

CONCLUSION

The decision sought to be reviewed involves questions of vital concern to the Federal Government and the several States. It is, therefore, respectfully submitted that this petition for writ of certiorari should be granted.

THOMAS S. LAWSON,
Attorney General of Alabama.

JOHN W. LAPSLEY,
Assistant Attorney General.

J. EDWARD THORNTON,
Assistant Attorney General.

GARDNER F. GOODWYN, JR.,
of Counsel.

APPENDIX

General Acts of Alabama, Regular Session and Special Session, 1939, Act No. 67:

Section 1. **DEFINITIONS.** The following words, terms and phrases when used in this act shall have the meaning ascribed to them in this Section, except where the context indicates a different meaning: (a) The term "person" or the term "company" herein used interchangeably, includes any individual, firm, company, partnership, association, corporation, receiver or trustee, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context. (b) The term "Department" means the Department of Revenue of the State of Alabama. (c) The term "Commissioner" means the Commissioner of Revenue of the State of Alabama. (d) The term "wholesale sale" or "sale at wholesale" means a sale of tangible personal property by wholesalers to licensed retail merchants, jobbers, dealers, or other wholesalers for resale and does not include a sale by wholesalers to users or consumers not for resale. The term "wholesale sale" shall include a sale of tangible personal property or products (including iron ore) to a manufacturer or compounder which enters into and becomes an ingredient or component part of the tangible personal property or products which he manufactures

or compounds for sale, and the furnished container and label thereof. (e) The term "sale at retail" or "retail sale" shall mean all sales of tangible personal property except those above defined as wholesale sales. The quantities of goods sold or prices at which sold are immaterial in determining whether or not a sale is at retail. Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold. Sales of tangible personal property or products to manufacturers, quarry operators, mine operators or compounders, which are used or consumed by them in manufacturing, mining, quarrying or compounding and do not become an ingredient or component part of the tangible personal property manufactured or compounded are retail sales. (f) The word "business" as used in this act, shall include all activities engaged in, or caused to be engaged in, with the object of gain, profit, benefit or advantage, either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activities shall be considered business engaged in, taxable in the class in which it falls. (g) The term "storage" means and includes any keeping or retention in this State for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased at retail. (h) The term "use" means and includes

the exercise of any right or power over tangible personal property incident to the ownership of that property, or by any transaction where possession is given, except that it shall not include the sale of that property in the regular course of business. (i) The term "purchase" means acquired for a consideration, whether such acquisition was effected by a transfer of title, or of possession, or of both, or a license to use or consume; whether such transfer shall have been absolute or conditional, and by whatsoever means the same shall have been effected; and whether such consideration be a price or rental in money, or by way of exchange or barter. (j) The term "sales price" means the total amount for which tangible property is sold, including any services (including transportation) that are a part of the sale, valued in money, whether paid in money or otherwise, and includes the amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest charged, losses or any other expenses whatsoever; provided, that cash discounts allowed and taken on sales shall not be included and sales price shall not include the amount charged for property returned by customers when the entire amount charged therefor is refunded either in cash or by credit. (k) The term "in this state" or "in the state" means within the exterior limits of the State of Alabama,

and includes all territory within such limits owned by or ceded to the United States of America.

Section II. (a) An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased at retail on or after the effective date of this act, for storage, use or other consumption in this state at the rate of two per cent (2%) of the sales price of such property, except as provided in subsection (b) of this section. (b) An excise tax is hereby imposed on the storage, use or other consumption in this state of any automotive vehicle purchased at retail on or after the effective date of this act, for storage, use or other consumption in this state at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) of the sales price of such automotive vehicle. Every person storing, using or otherwise consuming in this State tangible personal property purchased at retail shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to the State; provided, however, that a receipt from a retailer maintaining a place of business in this State or a retailer authorized by the Department, under such rules and regulations as it may prescribe, to collect the tax imposed hereby and who shall for the purposes of this act be regarded as a retailer maintaining a place of business in this State, given to the purchaser in accord-

ance with the provisions of Section V. hereof, shall be sufficient to relieve the purchaser from further liability for a tax to which such receipt may refer.

Section III. EXEMPTIONS. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act: (a) Property, the gross proceeds of sales of which are required to be included in the measure of the tax imposed by the provisions of House Bill 179 approved February 23, 1937 and known as the Alabama Luxury Tax Act or by the provisions of House Bill 82 approved February 8, 1939 and known as "An Act to Further Provide for the General Revenue of the State of Alabama." (b) Property, the storage, use or other consumption of which this state is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state. *****
(d) Property stored, used or consumed by the State of Alabama, by the counties within the State, or by incorporated municipalities of the State of Alabama. *****

Section IV. Every seller of tangible personal property for storage, use or other consumption in this state, engaged in the business of selling at retail in this state, shall within thirty days after the effective date of

this act, register with the Department and give the name and address of each agent operating in this state, the location of any and all distribution or sales houses or offices or other places of business in this state and such other information as the Department may require with respect to matters pertinent to the enforcement of this act; Provided, That it shall not be necessary for a seller, holding a license obtained pursuant to the provisions of House Bill 82 approved February 8, 1939 and any amendments thereto, to register with the Department as provided in this act.

Section V. Every such seller making sales of tangible personal property for storage, use or other consumption in this state, not exempted under the provisions of Section III. hereof, shall at the time of making such sales or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time of such storage, use or other consumption becomes taxable hereunder, collect the tax imposed by this act from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the Department. The tax required to be collected by the seller from the purchaser shall be displayed separately from the list, advertised in the premises, marked or other price on the sales check or other proof of sales. It shall be unlawful for any such seller to advertise or hold out or state to the public or to any customer, directly

or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the seller or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this Section shall be guilty of a misdemeanor. The tax herein required to be collected by the seller shall constitute a debt owed by the seller to this state.

Section VI. The tax imposed by this act shall be due and payable to the Department quarterly on or before the twentieth day of the month next succeeding each quarterly period during which the storage, use or other consumption of tangible personal property became taxable hereunder, the first of such quarterly periods being the period commencing with the first day of March, 1939, and ending the thirtieth day of June, 1939. Every such seller maintaining a place of business in this state shall on or before the twentieth day of the month following the close of the first quarterly period as above defined, and on or before the twentieth day of the month following each subsequent quarterly period of three months, file with the Department a return for the preceding quarterly period in such form as may be prescribed by the Department showing the total sales price of the tangible personal property sold by such seller, the storage, use or consumption of which became subject to the tax imposed by

this act during the preceding quarterly period and such other information as the Department may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein required to be collected by the seller during the period covered by the return. The Department, if it deems it necessary in order to insure payment to the State of the amount of tax herein required to be collected by sellers, may require returns and payment of such amount of tax for other than quarterly periods. Returns shall be signed by the seller or his duly authorized agent but need not be verified by oath. Every person purchasing tangible personal property, the storage, use or other consumption of which is subject to the tax imposed by this act, and who has not paid the tax due with respect thereto to a seller required or authorized hereunder to collect the tax, shall on or before the twentieth day of the month following the close of the first quarterly period as above defined, and on or before the twentieth day of the month following each subsequent quarterly period of three months, file with the Department a return for the preceding quarterly period in such form as may be prescribed by the Department showing the total sales price of the tangible personal property purchased by such person, the storage, use or other consumption of which became subject to the tax imposed by this act during the preceding quarterly period, and

with respect to which the tax was not paid to a seller required or authorized hereunder to collect the tax, and such other information as the Department may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein imposed and not paid to a seller required or authorized hereunder to collect the tax during the period covered by the return. The Department, if it deems it necessary in order to insure payment to the state of the amount of such tax may require returns and payment for other than quarterly periods. Returns shall be signed by the person liable for the tax or his duly authorized agent, but need not be verified by oath. For the purpose of the proper administration of this act and to prevent evasion of the tax and the duty to collect the same herein imposed, it shall be presumed that tangible personal property sold by any person for delivery in this state is sold for storage, use or other consumption in this state unless the person selling such property shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser to the effect that the property was purchased for resale and it shall be further presumed that tangible personal property shipped to this state by the purchaser thereof was purchased from a retailer on and after March 1st, 1939, for storage, use or other consumption in this state.

Section VII. Any person failing to pay any tax to the State or any amount of tax herein required to be collected and paid to the State, except amounts determined to be due by the Department under the provisions of Sections VIII and IX hereof, within the time required by this act shall pay in addition to the tax or the amount of tax herein required to be collected a penalty of ten per cent (10%) thereof, plus interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from the date at which the tax or the amount of tax herein required to be collected became due and payable to the State.

Section VIII. If the Department is not satisfied with the return and payment of the tax or amount of tax herein required to be paid to the State by any person, it is hereby authorized and empowered to compute and determine the amount required to be paid based upon the facts contained in the return or upon any information within its possession or that shall come into its possession. All amounts determined to be due under the provisions of this Section shall bear interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from the twentieth day after the close of the period or periods, as the case may be, for which such amounts were required to be reported to the Department until paid. If any part of the deficiency for which a determination of an addi-

tional amount due is made is due to negligence or intentional disregard of the act or authorized rules and regulations, a penalty of ten per cent (10%) of such amount shall be added thereto. If any part of the deficiency for which a determination of an additional amount due is made is due to fraud or an intent to evade the act or authorized rules and regulations, a penalty of twenty-five per cent (25%) of such amount shall be added thereto. The Department shall give to the retailer or person storing, using or consuming tangible personal property written notice of its determination. Such notice may be served personally or by mail. If by mail, said notice shall be addressed to the retailer or person storing, using or consuming tangible personal property at his address as the same appears in the records of the Department and sent by registered mail, return receipt requested.

Section IX. If any person neglects or refuses to make a return required to be made by this act, the Department shall make an estimate for the period or periods in respect to which such person failed to make a return, based upon information in its possession or that may come into its possession, of the amount of the total sales price of tangible personal property sold or purchased by such person, the storage, use or other consumption of which in this State is subject to the tax imposed by this Act, and upon the basis of said

estimate compute and determine the amount required to be paid to the State, adding to the sum thus arrived at a penalty equal to ten per cent (10%) thereof. All amounts determined to be due under the provisions of this Section shall bear interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from the twentieth day after the close of the period or periods, as the case may be, for which such amounts were required to be reported to the Department until paid. If the neglect or refusal of any person to file a return as required by this act was due to fraud or an intent to evade this act or rules and regulations hereunder, a penalty of twenty-five per cent (25%) of the amount required to be paid by such person shall be added thereto in addition to the ten per cent (10%) penalty as above provided. Promptly thereafter the Department shall give to such person written notice of such estimate, determination and penalty, the notice to be served personally or by mail in the same manner as prescribed for service of notice by the provisions of Section VIII hereof.

Section XI. Any person from whom an amount is determined to be due under the provisions of Sections VIII or IX hereof may petition for a redetermination thereof within thirty days after service upon such person of notice thereof. If a petition for redetermination is not filed within said thirty-day

period, the amount determined to be due becomes final at the expiration thereof. If a petition for redetermination is filed within said thirty-day period, the Department shall reconsider the amount determined to be due, and if such person has so requested in his petition, shall grant such person, his agent or attorney an oral hearing and shall give such person ten days' notice of the time and place thereof. The Department shall have power to continue the hearing from time to time as may be necessary. The order or decision of the Department upon a petition for redetermination shall become final thirty days after service upon such person or notice thereof. All amounts determined to be due by the Department under the provisions of Section VIII or IX hereof shall become due and payable at the time they become final and if not paid when due and payable there shall be added thereto a penalty of ten per cent (10%) of the amount determined to be due. Any notice required by this Section shall be served personally or by mail in the same manner as prescribed for service of notice by the provisions of Section VIII hereof.

Section XV. All taxes or amounts herein required to be collected not paid to the Department on the date when the same becomes due and payable shall bear interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from and after

the date when the same became due and payable until paid.

Section XVI. If upon examination it is amount of tax or an amount to be collected has been paid to the state in excess of the amount properly due, then the amount in excess shall be credited against any tax or amount required to be collected then due from such person and any balance of such excess shall be refunded to such person by whom such overpayment was made, by certificate of overpayment issued by the Department to the State Comptroller. If approved by the Comptroller, he shall draw his warrant on the State Treasurer for the amount so certified to be due.

Section XVII. If fraud or evasion on the part of any person is discovered by the department, it shall determine the amount by which the state has been defrauded, shall add to the amount so determined a penalty equal to twenty-five per cent (25%) thereof, and shall determine the same to be due from such person. All amounts determined to be due from any person under the provisions of this Section shall bear interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from the fifteenth day after the close of the period or periods, as the case may be, for which such amounts should

have been paid. The amount so determined shall be immediately due and payable and if not paid within ten days after the service upon such person of notice of the amount determined to be due, the delinquency penalty and interest provided in Section VII hereof shall attach thereto.

Section XVIII. The tax or any amount required to be collected hereunder together with interest and penalties imposed by this Act shall be a lien upon the property of the person required to pay such tax or other amount to the State, and the provisions of the revenue laws of the State of Alabama applying to liens for license taxes shall apply fully to the taxes herein levied.

Section XXII. All taxes, fees, interest and penalties imposed and all amounts of tax herein required to be paid to the state under this act must be paid to the Department of Revenue at Montgomery, Alabama, with remittances payable to the State Treasurer of Alabama. The funds received or collected by the Department under the provisions of this act shall be, without delay, deposited in the State Treasury. The amount remaining after payment of all expenses incurred by the Department in the collection of such funds or the administration of this act, shall be paid into the Special Educational Trust Fund to be expended only for salaries of

teachers in the elementary and high schools of the State.

Section XXIV. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collections of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the Commissioner of Revenue in the Circuit Court of Montgomery County, Alabama, in equity, praying a declaratory judgment determining his tax liability for the amount so paid or his rights to a refund thereof. From the decree of the Circuit Court either the Commissioner or the person making the payment may appeal direct to the Supreme Court within thirty days and such appeal shall be a preferred case. Upon the rendition of any final judgment declaring that the person making the payment is entitled to a refund thereof, either in whole or in part, then it shall be the duty of the State Comptroller or other proper officer upon presentation of a certified copy of such final decree to issue his warrant in favor of such person for the sum determined to be due together with in-

terest at six (6%) per cent per annum. No such action may be instituted more than one year after the tax or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said one year shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the Commissioner to recover any amount paid hereunder when such action is brought by or in the name of an assignee of the seller or other person paying said amount, or by any person other than the person who has paid such amount.

Section XXV. Any seller or other person failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data required by the Department, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars (\$500) for each such offense. Any person required to make, render, sign or verify any report as aforesaid, who makes any false or fraudulent return, with intent to defeat or evade the determination of an amount due required by law to be made, shall be guilty of misdemeanor, and shall for each such offense be fined not less than three hundred dollars (\$300) and not more than five thou-

sand dollars (\$5,000) or be imprisoned not exceeding one year in the county jail or be subject to both said fine and imprisonment in the discretion of the court.

Section XXVI. Any violation of the provisions of this act, except as otherwise herein provided shall be a misdemeanor and punishable as such.

Section XXVII. That the provisions of this Act are severable and if any section or sections, paragraph or paragraphs, sentence or sentences, clause or clauses, phrase or phrases, word or words of this act shall be held unconstitutional by the valid judgment or decree of any court of competent jurisdiction, the same shall not affect or impair any of the remaining provisions, sections, paragraphs, sentences, clauses, phrases and, or words of this act. It is hereby declared to be the legislative intent that this act and each section, paragraph, sentence, clause, phrase or word thereof would have been enacted had such unconstitutional section or sections, paragraph or paragraphs, sentence or sentences, clause or clauses, phrase or phrases, and word or words not been included herein.

Approved February 28, 1939.

Act of July 2, 1940, Pub., No. 703, 76th Cong., 3d Sess., c. 508:

SEC. 1. (a) In order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter, at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, unserviceable, obsolescent, or surplus military equipment, munitions, and supplies for other military equipment, munitions, and supplies of which there is a

shortage), and to amend or supplement such existing contracts, as he may deem necessary to carry out the purposes specified in this section: *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," approved June 30, 1936, (49 Stat. 2036; U. S. C., Supp. V, Title 41, secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

Military Appropriation Act, 1941, Public No. 611,
76th Congress, 3d Sess., c. 343:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Military Establishment for the fiscal year ending June 30, 1941, and for other purposes, namely: * * * * *

MILITARY POSTS

* * * * * emergency construction, \$47,976, 962, including the acquisition of necessary land therefor, without regard to the provisions of sections 355 and 1136, Revised Statutes, as amended (10 U. S. C. 1339; 40 U. S. C. 255); * * * * *

Act of October 9, 1940, Pub., No. 819, 76th Cong., 3d Sess., c. 787:

SEC. 1. (a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and

power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940.

SEC. 3. (a) The provisions of sections 1 and 2 of this Act shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy.